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June 13, 2003

T.R.A. DOCKET ROOM

Via Hand Delivery

Honorable Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Tariff Filing to Modify Language Regarding Special Contracts*
Docket No. 03-00366

Dear Chairman Kyle:

Please find enclosed for filing the original and 14 copies of AT&T Communications of the South Central States, LLC's Petition to Intervene in the above-captioned docket, along with our check in the amount of \$25.00. We would appreciate your noting this Petition to Intervene filed today.

Thank you for your assistance in this matter.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

Henry Walker

HW/th

Enclosures

cc: Guy Hicks, Esq.
Martha Ross-Bain, Esq.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re:

**Tariff Filing to Modify
Language Regarding Special Contracts**

)
)
) **Docket No. 03-00366**
)

PETITION TO INTERVENE

AT&T Communications of the South Central States, LLC ("AT&T") petitions the Tennessee Regulatory Authority (the "Authority") to intervene in the above-captioned proceeding.

This matter is before the agency upon the filing of a tariff by BellSouth Telecommunications Inc. ("BellSouth"). The tariff is unusual in that it does not have anything to do with the terms and conditions of regulated telecommunications services. Instead, it addresses how the Authority should handle BellSouth's Contract Service Arrangements ("CSAs") in light of recently enacted legislation.

Background

Under the TRA's rules, BellSouth's CSAs are "subject to supervision, regulation and control" by the Authority. Rule 1220-4-1-.07. "A copy of such special agreements shall be filed, [with the Authority] subject to review and approval." *Id.* Since BellSouth's CSAs include "rates and charges affecting Tennessee Intrastate business," the CSAs are treated as tariffs and must be filed "at least thirty days before the date upon which they are to become effective." Rule 1220-4-1-.06.

During that thirty-day period, the Authority staff reviews the CSA to determine if the CSA is consistent with federal and state law and with the criteria established by the

Authority. Those statutory and administrative criteria were recently spelled out in an Order issued by Director Tate in Docket No. 00-00702¹. She wrote, at page 7:

Each CSA has been evaluated and reviewed by Authority Staff to meet statutory requirements as well as guidelines reflected in settlement agreements and TRA orders.¹⁸

¹⁸ The criteria utilized by Authority Staff to review BellSouth CSAs was articulated by Mr. Joe Werner, Chief of the Telecommunications Division, at the January 27, 2003 Authority Conference. There Mr. Werner stated that each CSA is reviewed to determine: whether the rates comply with the statutory price floor included in Tenn. Code Ann. §65-5-208(c); whether the customer's name is disclosed in conformance with the Public Records Act; whether termination liability provisions are consistent with those adopted by the Authority in Docket 01-00681; whether there is an acknowledgement that the CSA is necessary to respond to competitive alternatives or competing offers; whether the CSA contains anti-competitive terms or otherwise illegal terms; whether the contract is available for resale as required by the FCC; for volume and term contracts, whether shortfall provisions do not apply in the event of early termination as ordered in Docket No. 99-00244; whether a 30-day notice consistent with TRA rules is present; and whether a summary of the CSA including rates and services offered in its tariffs is included. See Transcript of Authority Conference, pp. 107-108 (January 27, 2003).

This year, the Tennessee General Assembly enacted Public Chapter 41 regarding the CSAs of all telecommunications carriers. The new statute states:

Notwithstanding any other provision of state law, special rates and terms negotiated between public utilities that are telecommunications providers and business customers shall not constitute price discrimination. Such rates and terms shall be presumed valid. The presumption of validity of such special rates and terms shall not be set aside except by complaint or by action of the TRA directors, which TRA action or complaint is supported by substantial evidence showing that such rates and terms violate applicable legal requirements other than the prohibition against price discrimination. Such special rates and terms shall be filed with the authority.

¹ The Order was later orally affirmed by the Authority, but the written order of affirmance has not yet been issued.

The statute makes two significant changes in the manner in which the Authority regulates CSAs.

First, the statute states that the CSAs are "presumptively valid." Normally, a utility filing a proposed tariff must, if challenged, demonstrate to the Authority that the proposed change is "just and reasonable" and otherwise consistent with state and federal law. *See* T.C.A. §65-5-203. The utility, in other words, bears the burden of proof. Under the new statute, however, a proposed CSA is presumed valid which means that the burden of proof has shifted. Now, anyone challenging a proposed CSA must demonstrate that the tariff is not just and reasonable or is otherwise inconsistent with state and federal law. Moreover, such a demonstration must be made by "substantial evidence." This is a significant departure from current law and will make it more difficult for a complaining party to persuade the Authority not to approve a CSA.

The second change effectuated by the new statute involves price discrimination. Under T.C.A. §65-4-122, which has not been amended, a regulated utility cannot charge one customer more than another "for service of a like kind under substantially like circumstances and conditions." Any utility which "makes any preference" between similarly situated parties "commits unjust discrimination."

The new statute expressly exempts CSAs from the state prohibition against price discrimination. In other words, a regulated telephone carrier may now use a CSA to offer service to one customer which is more or less expensive than the same service offered to a similarly situated customer without violating state law².

² Discrimination among similarly situated customers is still prohibited by federal law. To the extent a CSA includes regulated interstate services, the utility must still make such services available on the same terms and conditions to similarly situated customers. *See* 47 U.S.C. §202.

Those are the only changes made by the new statute. There is nothing in the statute which:

- changes the Authority's rules regarding the filing of CSAs;
- amends the state and federal requirements that CSAs must be priced above cost and made available for resale; or
- affects the Authority's prior orders and decisions regarding CSA termination provisions, proof of a competitive offer, and other anti-competitive practices.

The new statute still requires that CSAs be filed with the Authority and the Authority still has a mandatory, statutory obligation to insure that each CSA is "just and reasonable" and otherwise consistent with state and federal law. If the Authority is presented with "substantial evidence" of non-compliance, the Authority must disapprove the CSA.

Argument

BellSouth has filed a tariff which purports to interpret Chapter 41. The tariff states that CSAs "shall be effective immediately upon filing." The tariff also states that CSAs are available for resale and that, despite the change in the law on price discrimination, CSAs will continue to be made available to "similarly situated customers." Finally, the tariff states that BellSouth will no longer include the CSAs in its tariffs, but that the CSAs will nevertheless be available for public inspection at the TRA.

The proposed tariff is not consistent with the TRA's rules which, as Director Tate noted in her Order, require that BellSouth's CSAs be filed thirty (30) days prior to the effective date. There is nothing in the statute which requires or implies that CSAs

become effective on the date filed. To the contrary, the statutory scheme is that the Authority will continue to review CSAs and that other parties will be given the opportunity to contest a CSA before it becomes effective.

The statute states that a CSA is "presumptively valid." Under Tennessee law, a presumption is "a rule of law, created by statute or judicial decision, in which a finding of the basic fact of the presumption gives rise to the existence of the presumed fact until the presumption is rebutted and becomes inoperative." Whinery, Manual of Evidence (1973) (emphasis added). A legal presumption is a "fiction of law or an assumption for convenience but [the] assumption is waived where contrary proof is introduced." *McMahan v. Tucker*, 216 S.W.2d 356 (Tenn. Ct. App. 1948). "When proofs are present, there is neither foundation nor room for presumption." *Schindler v. Southern Coach Lines*, 217 S.W.2d 775 (Tenn. 1949). *See also, Stone v. City of McMinnville*, 896 S.W.2d 548 (Tenn. 1995).

In other words, a presumption may be overcome by evidence to the contrary. By declaring that CSAs become effective upon filing, BellSouth would deny other parties the opportunity to present such evidence to the Authority and thereby persuade the agency that the CSA should not be approved.

Furthermore, under T.C.A. §65-5-203, the TRA has the power to suspend any proposed change in utility rates or terms and conditions of service for up to nine months. Although that suspension power is not often invoked, it is nevertheless one of the Authority's most effective regulatory tools. If a filing raises novel or difficult regulatory issues, the Authority can suspend the filing for investigation before it becomes effective. Otherwise, it may well be too late. If, for example, the TRA allows a proposed CSA to

become effective but later determines that the price in the CSA is below the statutory price floor or is anti-competitive for other reasons, the damage to competitors and the competitive marketplace will already have occurred. The customer will be lost and the competitor economically damaged with no recourse.

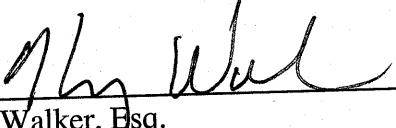
During the TRA's long investigation of how the agency should regulate CSAs, BellSouth's constant complaint was that the company needed more "certainty" that its CSAs would become effective thirty (30) days after filing and that BellSouth needed to be able to provide reasonable assurance to its customers that the contract would take effect on the date anticipated by the parties. Chapter 41 has accomplished that purpose. Under the new statute, any party objecting to a CSA bears the burden of presenting "substantial evidence" that the CSA should not be approved. Properly priced and non-discriminatory CSAs are likely to go into effect on the date anticipated by the parties to the contract. Thus, BellSouth has obtained all the reasonable "certainty" it claimed to have wanted.

Finally, the Authority should not allow BellSouth to abuse the tariffing process in this manner. The purpose of a tariff is to describe the rates and terms of services, not to re-write the agency's rules and policies or to interpret state statutes. If BellSouth wants to ask the agency to interpret Chapter 41, the company may file a Petition for Declaratory Ruling. It cannot, however, simply file a tariff purporting to interpret the statute and thereby avoid giving other interested parties the opportunity to address the issues raised by the new law.

Conclusion

As a competing, local exchange carrier in Tennessee, AT&T has a legally recognizable interest in insuring that BellSouth's terms and conditions of service are consistent with state and federal law. Therefore, AT&T petitions to intervene in this docket and asks that the Authority suspend BellSouth's proposed tariff and schedule a contested case proceeding to consider whether it should be approved.

Respectfully submitted this 13th day of June, 2003.


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*Attorneys for
AT&T Communications of the South Central States, LLC*

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be served by United States
mail a copy of the within and foregoing Petition to Intervene upon the following person,
properly addressed as follows:

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

This 13th day of June, 2003.



Henry Walker